THE STATES AND FOREIGN RELATIONS.

THE conduct of a nation's foreign relations may be affected to a considerable extent by its internal governmental organization. Generally speaking, a more energetic and effective foreign policy is possible for a nation whose government is characterized by unity and coherence. This is true not only with reference to the relations between the departments of the central government, but also with reference to the relations between the central government and the local or state governments. In countries whose government is based on the federal plan, therefore, an important question to be considered is that as to the extent, if any, of the control over foreign relations to be assigned to the component governmental subdivisions. The tendency in federal, and even in confederate, governments is to restrict within very narrow limits, if not absolutely to prohibit, any direct control by the component states over foreign relations.

Under the Articles of Confederation the diplomatic, war, and treaty powers were, in terms, vested in the central government, and the powers of the states in those respects were restricted within narrow limits. The Articles, however, protected the legislative power of the states with reference to foreign commerce even as against the power of the central government to control foreign relations. treaties, and, in practice, this operated as a serious limitation upon the power of the central government to control foreign relations. The confusion resulting from divided control over commerce was one of the principal causes leading to the adoption of the Constitution.

The experience secured under the Articles led to the placing in the Constitution of strict limitations upon the power of the states in connection with foreign relations. They were absolutely prohibited from making treaties, but treaties made under the authority of the United States were declared to be the supreme law of the land, notwithstanding anything to the contrary in the laws of any state. Moreover, the states were prohibited, without the consent of Congress, from entering into any agreement or compact with a foreign power and from engaging in war, unless in imminent danger of invasion.[1]

[1] The powers of the states, moreover, are restricted with reference to the regulation of foreign commerce, and the levying of import and export duties. It should also be mentioned in this connection that the state courts are ex-

The term "war" properly refers to an armed conflict between nations and, as here used, probably refers to danger from a foreign source or from Indians.[2]

In 1839 our relations with Great Britain became strained on account of the dispute over the location of the Northeastern boundary line between Maine and Canada. During that year, what was known as the "Aroostook War" broke out between Maine and New Brunswick when opposing forces were marched into the disputed territory. The United States and Great Britain, however, entered into negotiations for a treaty to settle the dispute. "It was deemed necessary on the part of our Government to secure the cooperation and concurrence of Maine, so far as such settlement might involve a cession of her sovereignty and jurisdiction as title to territory claimed by her, and of Massachusetts, so far as it might involve a cession of title to lands held by her. Both Maine and Massachusetts appointed commissioners to act with the Secretary of State and, after much negotiation, the claims of the two states were adjusted and the disputed questions of boundary settled."[3] The result was the Webster-Ashburton treaty of 1842, by article V of which the United States agreed to receive and pay over to Maine and Massachusetts their share of the "disputed territory fund" and also to compensate those states by the payment of a further sum of money on account of their assent to the boundary line fixed by the treaty.[4]

Although the claims of the two states were recognized by the treaty, they were not adjusted directly by those states, but by the Government of the United States acting on their behalf. As has been suggested, Webster did not consider the cooperation of the state authorities a constitutional necessity, but rather that it was expedient from a political standpoint that the opinion of these states should be considered.[5] This writer admits, however, that states

cluded from jurisdiction in cases to which foreign ambassadors, other public ministers, or consuls are parties.

[2] W. W. Willoughby, CONSTITUTIONAL LAW OF THE UNITED STATES, II, 1239. Chief Justice Taney, in Luther v. Borden (7 How. 1) declared that Rhode Island, during Dorr's Rebellion, was in a state of war; but this was a misuse of the term, as was pointed out by Justice Woodbury in his dissenting opinion.

[3] Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 541, quoting 5 WEBSTER'S WORKS 99; 6 *ibid.* 273.

[4] MALLOY, TREATIES, etc., I, 654.

[5] WILLOUGHBY, *op. cit.*, I, 509.

might possibly have international dealings with reference to such an unimportant matter as the administration of fishing upon boundary waters.[6] In this connection, it has been suggested that a state might enter into an agreement with Canada or a bordering Canadian province to regulate fisheries in their contiguous waters, in the absence of a formal treaty by the United States regulating the matter. "May there not," this writer asks, "properly be an autonomy in local external affairs, at least as to the states bordering on Canada or Mexico, just as there is a local autonomy in matters purely domestic?"[7]

The question came before the Supreme Court in 1840 as to whether the surrender to the Canadian authorities by the governor of Vermont of a fugitive from justice was within his constitutional power. There was no judgment rendered in the case since the court was equally divided on the question of jurisdiction, but a majority of the judges, including Chief Justice Taney, were of the opinion that the governor did not have the power to deliver up the fugitive to a foreign government. In his opinion, Taney pointed out that such a delivery involved the making of an agreement with a foreign government, which the states were incompetent to make without the consent of Congress.[8] Many years later the same court declared, *obiter,* that "there can be little doubt as to the soundness of the opinion of Chief Justice Taney that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country, which has undoubtedly been conferred upon the Federal Government; and that it is clearly included in the treaty-making power, and the corresponding power of appointing and receiving ambassadors and other public ministers. There is no necessity for the states to enter upon the relations with foreign governments, which are necessarily implied in the extradition of fugitives from justice found within the limits of the state, as there is none why they should in their own name make demand upon foreign nations for the surrender of such fugitives. At this time of day and after the repeated examinations which have been made by this court into the powers of the Federal Government to deal with all such international ques-

[6] *Ibid.,* I, 508, note 23.

[7] J. F. Barnett, "International Agreements Without the Advice and Consent of the Senate," YALE LAW JOURNAL, XV, 23, 27. But see, *contra,* BUTLER, TREATY-MAKING POWER, I, sec. 123.

[8] 14 Pet. 540.

tions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of the Union and a foreign government."[9]

The governor of a state from which a fugitive from justice has fled to a foreign country must ordinarily act through the Secretary of State at Washington in demanding from such government the return of the fugitive in accordance with extradition treaties between the two countries. The situation would doubtless be altered, however, where there are acts of Congress or treaties of the United States expressly authorizing extradition proceedings to be conducted by the governor of the state directly with the authorities of the foreign government. Thus, by our treaty of 1861 with Mexico, the chief executives of the border states and territories were authorized to make requisitions and to grant extradition in certain cases.[10] Again, by our extradition conventions with Denmark and the Netherlands, it is provided that application for the surrender of a criminal may be made directly to or by the governor or chief magistrate of the island possession or colony of the respective countries.[11] In such cases, it may be said that the chief executive of the state or territory is acting primarily as the agent of the United States Government.

In general, however, it is true that, for all practical purposes, the direct contact of the state governments with foreign governments is, under the Constitution, reduced to a negligible quantity. The general doctrine on this matter has been laid down by the Supreme Court in a number of cases. Thus, in the *Arjona* case, wherein was upheld a Federal statute punishing the counterfeiting in the United States of the securities of foreign nations, the Court said: "The Government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. * * * Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States."[12] Again, in the Chinese exclusion case, the Court says: "For local interests, the several states of the

[9] United States v. Rauscher, 119 U. S. 407 (1886).

[10] MALLOY, 1126. This provision was renewed by the treaty of 1899, *ibid.*, 1188. Cf. MOORE, EXTRADITION, I, 53-78.

[11] MALLOY, 395, 1272.

[12] United States v. Arjona, 120 U. S. 479.

Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[13] The same principle is thus stated by the Court in the *Legal Tender* case: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all of which are forbidden to the state governments."[14]

Although the general principle, as thus stated by the Supreme Court, is undoubtedly correct as far as the direct control by the states over foreign relations is concerned, it is still possible for the states to take action which may indirectly affect such relations. The extent of such indirect influence may, of course, vary considerably. State legislatures not infrequently pass resolutions petitioning Congress or the Executive to take or not to take certain action in connection with our foreign relations, or expressing congratulation or sympathy with particular foreign countries.[15] Such a resolution is likely in many cases to be a mere *brutum fulmen* and is usually pure buncombe. A feeling is growing apparently that the state legislatures should not thus attempt to take a hand in foreign affairs unless the question is deemed peculiarly to affect the welfare of the state.

A more important method by which a state may indirectly influence foreign relations is through the taking of action which may purport to affect the status of aliens residing in such state, or through its failure to take action for their protection in the exercise of rights which they claim under treaties. This situation is thus described in a Senate document relating to the power of recognition: "A state of the Union, although having admittedly no power whatever in foreign relations, may take action uncontrollable by the Federal Government, and which, if not properly a *casus belli,* might nevertheless as a practical matter afford to some foreign nation the excuse of a declaration of war. We may instance the action which might have been taken by the state of Wyoming in relation to the Chinese massacres, or the state of Louisiana in relation to the Italian lynchings,

[13] Chae Chan Ping v. United States, 130 U. S. 581, 606; cf. Fong Yue Ting v. United States, 149 U. S. 698.

[14] Knox v. Lee, 12 Wall. 457, 555.

[15] Thus, in 1897, the Senate of Nebraska adopted a resolution extending to Cuba their sympathy. U. S. Senate doc. 82, 54th Cong., 2nd sess.

or by the state of New York in its recent controversy with German insurance companies with relation to the treatment of its own insurance companies by Germany."[16] As to whether the action of the states in such matters is, in all cases, uncontrollable by the Federal Government, there may be some question, but, judging by the number of instances in which the nation has been embroiled in international difficulties by the action or non-action of the states, it would seem that no effective means of preventing such action has yet been devised. Some of the difficulties encountered have been due to the lack of protection afforded aliens by the states against individual or mob violence and the lack of means of redress afforded against such injuries. Congress could probably constitutionally provide such means of redress through Federal agencies, but has thus far failed to do so.[17] Other difficulties arise from the passage of acts or ordinances by states or municipalities which discriminate or are alleged to discriminate against aliens in violation of their treaty rights. Among these are labor laws, land laws, and those regulating the privilege of attending the public schools. Some of these, as enacted in various states, have been declared unconstitutional by the courts as in violation of treaty provisions. Probably the most conspicuous of the state laws and local ordinances which have given rise to international difficulties are the San Francisco school ordinance and the California alien land law, aimed at aliens ineligible to citizenship. The public sentiment in that state on the matter is forcibly indicated by the adoption in 1920 through the popular initiative by a vote of three to one of an alien land law, against which Japan is said to have protested as in violation of treaty rights.[18]

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[16] U. S. Senate doc. 56, 54th Cong., 2nd sess., p. 5.

[17] Baldwin v. Franks, 120 U. S. 678.

[18] The action of the people of California in enacting directly through the popular initiative this alien land law is an example of popular influence in foreign affairs, exercised in a somewhat novel fashion. The desirability of having the support of public opinion in the conduct of foreign relations has often been recognized by various Presidents, who have sometimes made direct appeals to the people on behalf of particular policies. The importance of public opinion in such matters has also been recognized by other governments, as was illustrated by their attempts to influence it, before our entrance into the World War, through securing control of newspapers and other means of publicity and propaganda. There has been much said in favor of the democratic diplomacy of full publicity. Intelligent and judicious influence by the people in foreign relations, however, presupposes a considerable degree of

It is not necessary here to elaborate upon this topic. It may be said, however, that the treaty-making power has itself at times recognized the desirability of avoiding, if possible, a conflict with the states in attempting to regulate matters otherwise under their control. Provisions have been inserted in treaties which, instead of purporting directly to control the matter in question, merely constitute an undertaking on the part of our Government to recommend to the states the taking of the appropriate action. The earliest example of this is contained in article V of the treaty of 1783 with Great Britain, by which it was agreed that the Confederate Congress should "earnestly recommend to the legislatures of the respective states to provide for the restitution of all estates" of British subjects.[19] Examples of similar provisions may also be found in treaties

popular education in such matters. The extent of desirable publicity in foreign policy is logically limited by the extent to which the people can exercise an effective control, and that includes merely general policies and not details nor matters requiring quick decision. Some persons have advocated a popular referendum on the question of peace or war as a preliminary step to the entrance into war by the United States. W. J. Bryan has gone on record as declaring that "a referendum on war would give greater assurance of peace than any other provision that could be made." (Editorial reprinted in CONGRESSIONAL RECORD, January 22, 1920, p. 1966.) The delay, however, which would be produced in coming to a decision if such a plan were adopted would seem alone to be sufficient to render it impracticable. There are many matters arising in connection with the conduct of foreign relations, especially during a crisis, which cannot safely brook the delay necessarily involved in a popular referendum. The inherent defects of the control of foreign policy by a deliberative assembly would be greatly enhanced by the adoption of such a plan. Often there is no time for consulting the popular will and, even if it were done, in many cases no clear answer would or could be given. It would be difficult to frame the issue, for the maneuvers of the foreign government would be an uncertain and uncontrollable factor in the situation. The objections to the popular referendum in foreign affairs have been summed up as follows: "The referendum is not advisory in any honest sense of the word, because the decision of the government must be composed of an intricate series of problems which cannot be isolated. On most of the points the answer is not yes or no but a course of action with many ramifications of detail. A government dependent on referendum for advice about every crucial point could survive only in a world where magic kept everything frozen tight while the referendum was being taken. In a world of swift action, of surprises, of intrigue, there can be neither safety nor success for an administration which had no power to act." (THE NEW REPUBLIC, February 24, 1917, p. 92.)

[19] MALLOY, TREATIES, etc., I, 588.

made since the adoption of the Constitution. Thus, by article VII of the treaty of 1853 with France, it is provided that "as to the states of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right."[20]

Instances of treaty provisions such as those cited above have been rare, and, as has been pointed out, if the United States were required, as a rule, to resort to such procedure, the ultimate result would be that few nations would be willing to grant us privileges in exchange for a promise on the part of our Government merely to recommend to the states the granting of a similar privilege.[21] The courts have construed the treaty-making power as extending to all matters which are appropriate subjects of international negotiation,[22] and, as the Supreme Court declared in the *Arjona* case, "the national government is * * * responsible to foreign nations for all violations by the United States of their international obligations."[23] This being the case, it follows that the National Government must have power commensurate with its responsibility. Ultimately, by Congressional action, or by constitutional amendment if necessary, means of control must be provided for the preservation of treaty rights by the National Government. At the same time, care should be taken, so far as possible, that no treaty engagements should be entered into, the carrying out of which will arouse the deep-seated hostility of the great majority of the people in particular states.[24]

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[20] *Ibid.*, I, 531. Cf. a similar provision in the treaty of 1871 with Great Britain, *ibid.*, I, 711.

[21] Crandall, TREATIES, THEIR MAKING AND ENFORCEMENT, p. 267.

[22] De Geofroy v. Riggs, 133 U. S. 256, 266-7; cf. Missouri v. Holland, 252 U. S. 416.

[23] United States v. Arjona, 120 U. S. 479.

[24] GENERAL REFERENCES.—Crandall, S. B., TREATIES, THEIR MAKING AND ENFORCEMENT, pp. 141-145, and chap. XVI.

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